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No. 07-1025

CAPITAL CASE

In The
Supreme Court of the United States

JAMES RANDALL ROGERS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner JAMES R. ROGERS, based on intervening circumstances of substantial or controlling effect and a substantial ground not previously presented, respectfully requests that this Court vacate its denial of his Petition for Writ of Certiorari as entered on April 14, 2008, and grant certiorari.

On February 4, 2008, Mr. Rogers filed a petition for a writ of certiorari asking this Court to examine the legal determinations by Georgia state courts relating to mental retardation and the Eighth Amendment. Specifically, Mr. Rogers presented the following questions:

(1) Whether the execution of Petitioner Rogers, who suffers from severe organic brain damage and significantly sub-average intelligence that interferes with his mental capacity and ability to function, who manifested impairments in adaptive behavior similar to those found in mentally retarded individuals during his development, and who was just 19 years and one month old at the time of the crime, would violate the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment right to equal protection.

(2) Whether the Georgia trial court denied Petitioner Rogers assistance of counsel in violation of *United States v.*

Gonzales-Lopez, 548 U.S. 140, 126 S. Ct. 2557 (2006), and the Sixth Amendment when it refused to permit Rogers' chosen, pro bono counsel - the only counsel who was prepared - to argue critical pre-trial motions at his mental retardation hearing.

(3) Whether the Georgia trial court's use of civil trial procedures at Petitioner Rogers' mental retardation hearing, instead of the criminal procedures requisite to the continuation of Rogers' criminal trial, violated Rogers' rights to due process and equal protection.

Mr. Rogers respectfully requests that this Court rehear his case, as this Court denied his petition without the benefit of argument based upon the recent decision in *State v. White*, No. 2006-0295, 2008 WL 1699280 (Ohio April 9, 2008).

The petitioner in that matter, Clifton White III, was a prisoner under sentence of death for aggravated murder who, following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), filed a successor petition for post-conviction relief asserting that the Eighth Amendment prohibited his execution because he was mentally retarded. *White*, 2008 WL 1699280 at *1. Experts for Mr. White and the state jointly conducted tests to determine whether he was mentally retarded, including the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), a standard IQ test; the Wide Range Achievement Test, Third Edition ("WRAT-III"), which measures academic achievement;

and the Scales of Independent Behavior-Revised ("SIB-R"), which measures adaptive skills. *Id.* at *2. While the results of the WAIS-III and WRAT-III established Mr. White's significantly sub-average intellectual functioning, *id.*, and the SIB-R indicated that Mr. White suffered from significant limitations in adaptive skills, *Id.* at *3-4, the trial court ultimately denied Mr. White's petition for post-conviction relief, ruling, *inter alia*, that he had failed to establish "significant limitations in two or more adaptive skills . . . ." *Id.* at *5.[1]

In so concluding, the trial court disregarded the results of this expert testing in favor of anecdotal lay testimony suggesting that Mr. White had no adaptive behavior deficits. The trial court relied heavily upon the testimony of Heather Kawczk, Mr. White's former girlfriend, and whose mother he had allegedly killed, to the effect that Mr. White "was popular in school and participated in activities with others. She testified that he worked, rented an apartment, bought a truck, and helped her when she bought a car. She also testified that White could cook, drive, and play games that required coordination." *Id.* at *4.

While acknowledging the possibility of Ms. Kawczk's bias, the trial court found that Ms. Kawczk's testimony provided "credible anecdotal evidence . . . to demonstrate a level of performance perceived by [White's] closest companion to be reasonably

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[1] The trial court also erroneously concluded that Mr. White had not proven the onset of sub-average intellectual functioning and adaptive behavior deficits before the age of 18.

sophisticated, other than retarded, and fairly well mainstream." *Id.* at *5. The trial court found the evidence of mental retardation further wanting in that "not a single anecdote has been supplied to the experts, and restated to this court by anyone, of any incongruent behavior – something bizarre, something out of the ordinary – anecdotes which demonstrate that his family and peers considered him significantly deficient in adaptive behavior skills." *Id.*

On appeal, the Supreme Court of Ohio reversed, holding that the trial court had abused its discretion by refusing to find that Mr. White had established retardation by a preponderance of the evidence. *Id.* at *7. While noting that the record lent no support to the trial court's apparent belief that the SIB-R's use of information from Mr. White and his family compromised its validity, the Court also criticized the trial court's interpretation of Ms. Kawczk's testimony as evidence that Mr. White had no adaptive limitations. "According to the undisputed testimony of the expert witnesses in this case," the Court noted, "the facts stated in Kawczk's testimony *are in no way inconsistent with mild mental retardation*." *Id.* at *9 (emphasis added). As the Court summarized, "[t]he mentally retarded are not necessarily devoid of all adaptive skills. Indeed, they may look relatively normal in some areas and have certain significant limitations in other areas. Mildly retarded persons can play sports, write, hold jobs, and drive." *Id.* (Internal quotations omitted.) Indeed, the Court observed, the expert testimony stated that "in determining whether a person is mentally retarded, one must focus on those adaptive skills the person *lacks*, not on those he possesses." *Id.* (Emphasis

added.) The Court accordingly held that the fact that Mr. White had a driver's license and some aptitude with video games had no clear relevance to the question of his mental retardation. *Id.* The Court further criticized the trial court's emphasis on the fact that Mr. White's family and peers did not perceive his lack of adaptive behavior skills, as laymen cannot easily recognize mild mental retardation, and its focus on whether Mr. White had exhibited behavior that was "bizarre" or "out of the ordinary," when there was no evidence that "bizarre" behavior "is a necessary attribute of the mentally retarded." *Id.* Holding that individuals suffering from mental retardation "may look relatively normal in some areas and have . . . significant limitations in other areas," the Supreme Court concluded that "the impressions of White's peers as relayed by Kawczk lend no support to the findings of the trial court." *Id.* The Supreme Court accordingly concluded the trial court "abused its discretion when it determined that White had failed to prove the existence of significant adaptive-skills limitations." *Id.*

In light of this analysis, Mr. Rogers respectfully submits that this Court should revisit the state courts' determinations that Mr. Rogers does not suffer from mental retardation. In holding that Mr. Rogers failed to prove his mental retardation, both his jury and the Supreme Court of Georgia relied upon evidence that Mr. Rogers "checks out prison library books on a regular basis and is able to use the computer." *Rogers v. State*, 282 Ga. 659, 660, 653 S.E.2d 31, 35 (Ga. 2007). Such evidence, which has no clear relevance to the question of whether Mr. Rogers is mentally retarded, was clearly interpreted as rebutting evidence of adaptive behavior deficits. As the decision in *White*

makes clear, the state courts' analysis should properly focus on those areas in which Mr. Rogers manifests deficits, not areas in which his deficits are less plain.

For the reasons set forth in the original petition for writ of certiorari and in light of the new decision in *White*, this Court should now grant certiorari to hear Petitioner's case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44 of this Court, counsel for Petitioner certifies that the issue presented in this Petition for Rehearing of the Denial of Petition for Writ of Certiorari is limited to intervening circumstances of a substantial or controlling effect and concerns a substantial legal ground not previously presented to this Court. Counsel further certifies that because this issue raises an important question of constitutional jurisprudence, it is presented in good faith and not for purposes of delay.

Respectfully submitted,

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